(6)

No. 90-681

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMICUS CURIAE NANCY HABERSTROH, Ph. D.; CERTIFICATE OF NOTICE; and NOTICE OF APPEARANCE

GREENFIELD GRAPHICS

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BRIEF FOR THE AMICUS CURIAE
NANCY HABERSTROH, Ph. D.;
CERTIFICATE OF NOTICE; and
NOTICE OF APPEARANCE

Comes now Nancy Haberstroh, Ph.D., of Longmeadow, in the Commonwealth of Massachusetts, Amicus Curiae, and moves the Court for leave to file the within Brief in support of the position taken by the Respondents. And she says that the judgment of the Court will be binding applicable precedent in an action which she has pending in the Superior Court of said Commonwealth, all as described in her Statement of Interest. And further she says that William Goldstein of Bensalem, Pennsylvania, counsel for the Respondents, has assented to the filing of said Brief, and has authorized Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, to affix his statement of assent hereto, but that Jerome R. Richter of

Philadelphia, Pennsylvania, attorney for the Petitioner, has refused to assent. And she says that the within Brief may be helpful to the Court, and that the same contains arguments of law that may not be adequately presented by the Respondent, whose interests are in conflict with her own.

NANCY HABERSTROH, Ph.D.

By _____
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I assent to the allowance of said Motion and the filing of the within Brief, and authorize Stephen R. Kaplan of Northampton, a member of the Bar of this Court, to affix my signature hereto.

_____ SRK
William Goldstein
Attorney at Law
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Bensalem, PA 19020
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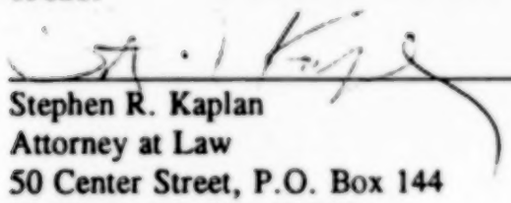
CERTIFICATE OF SERVICE

Hampshire, ss: May 3, 1991

I, Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, hereby certify that, on or before this date, while acting on behalf of the Amicus Curiae Nancy Haberstroh Ph. D., of Longmeadow, Massachusetts, I served the within Motion and Brief on all parties required to be served by

depositing in a United States Post Office three copies, first class postage prepaid, addressed to Jerome R. Richter, Esq., Attorney for the Petitioner, at his offices at Four Penn Center Plaza, Philadelphia, Pennsylvania 19103, and by depositing in a United States Post Office, three copies, first class postage prepaid, addressed to William Goldstein, Attorney for the Respondents, at his offices at Four Greenwood Square, Bensalem, Pennsylvania 19020.



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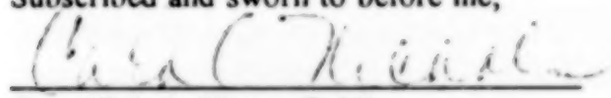
Hampshire, ss: May 3, 1991

Subscribed and sworn to before me,



Cara Nichols Notary Public
My Commission Expires November 4, 1994

NOTICE OF APPEARANCE

Hampshire, ss: May 3, 1991

I, Stephen R. Kaplan of Northampton, Massachusetts, a member of the Bar of this Court, hereby appear for the Amicus Curiae Nancy Haberstroh, Ph. D., of Longmeadow, Massachusetts.

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Statement of Interest of Amicus Curiae

Your amicus curiae submits this Brief in support of the position taken by the respondents at bar. Chief of the Department of Psychology at Monson Developmental Center, a facility of the Commonwealth of Massachusetts Department of Mental Retardation, she presently has pending in the Commonwealth Superior Court an action under 42 U.S.C. § 1983 for compensatory and punitive damages against five of her erstwhile superior officers, whom she sues in their individual capacities. Supported by the findings of an official investigator and by the Commonwealth's prearbitration settlement of her grievance under the applicable collective bargaining agreement, she bases her action on defendants' unlawful agreement, which was carried into execution, to punish her for First Amendment activity by subjecting her to a fraudulent evaluation, trumped-up charges, and demotion to an entry-level position. Acting under the State Tort Claims Act, Massachusetts General Laws Chapter 258, Section 9A, the Commonwealth has undertaken to indemnify all of the defendants except for the former facility superintendent and chief accused, but is precluded from doing so in the case of wilful, wanton, or malicious conduct. *Id.* Under applicable State precedent, liability for punitive damages erects a bar to indemnity. *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 524 N.E. 2d 1351 (1988). If this Court determines the Questions Presented adversely to respondents, the resulting precedent will impair your amicus's federal cause of action.

Summary of Argument

Under governing English and American precedents from *Entick v. Carrington*, 19 How St Tr, 1029, 95 Eng Rep 807 (1765), through and including *Quern v. Jordan*, 440 U.S. 332, 59 L Ed 2d 332 (1979), sovereign immunity is not implicated in an award of damages against an officer in his or her personal estate. Accordingly, this Court has developed doctrines of qualified immunity to protect officers performing nonjudicial functions in a manner not inconsistent with clearly established law. These embrace functions which could only be performed on behalf of government, inclusive of personnel actions. A state officer performing such functions is a person acting under color of law, and so is subject to actions at law under 42 U.S.C. § 1983.

Argument

Sovereign immunity is not implicated in an award of damages against an officer in his personal estate by reason of his official acts. See, e.g., *Entick v. Carrington*, 19 How St Tr, 1029, 95 Eng Rep 807 (1765);[1] *Little v. Barreme*, 2 Cranch 170,

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[1] Churchill describes this case:

"There were other conflicts. On April 23, 1763, a newspaper called *The North Briton* attacked Ministers as 'tools of despotism and corruption'...The writer hinted that the peace treaty with France was not only dishonourably but also dishonestly negotiated, and that the King was a party to it. George was incensed. A week later his Secretary of State issued a warrant commanding that the authors, printers, and publishers of '*The North Briton*, No. 45,' none of whom was named, should be found and arrested. Searches were made, houses were entered, papers were seized, and nearly fifty suspects were put in prison. Among them was John Wilkes, a rake and a Member of Parliament. He was sent to the Tower....But his cause became a national issue when he returned to fight for his Parliamentary seat. The radical-minded Londoners welcomed this rebuff to the Government, and in March 1768 he was elected for Middlesex. The next February he was expelled from the House of Commons and there was a by-election. Wilkes stood again, and obtained 1,143 votes against his Government opponent, who polled 296. There were bonfires in London....

2 L Ed 243 (1804) (seizure of vessel by naval officer acting under

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"Wilkes's cause now found the most powerful champion in England. Pitt himself, now Earl of Chatham, in blistering tones attacked the legality of general warrants and the corruption of politics....[T]he outcry against general warrants led directly to important pronouncements by the judges on the liberty of the individual, the powers of the Government and freedom of speech. Wilkes and the other victims sued the officials who had executed the warrants. The judges ruled that the warrants were illegal. The officials pleaded that they were immune because they were acting under Government orders. This large and sinister defense was rejected by the Chief Justice in words which remain a classic statement on the rule of law. 'With respect to the argument of State necessity,' declared Lord Camden, 'or a distinction which has been aimed at between State offenses and others, the Common Law does not understand that kind of reasoning, nor do our books take notice of any such distinction.' If a Minister of the Crown ordered something to be done which was unlawful, then both he and his servants must answer for it in the ordinary courts of law in the same way as a private person....Wilkes obtained £4,000 damages from the Secretary of State himself. Another suitor, who had been detained only for a few hours and fed with steak and beer, recovered £300. 'The small injury done to the plaintiff,' said the Chief Justice, 'or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point touching the liberty of the subject appeared to them at the trial.'

"Here indeed was a potent weapon against overbearing ministers and zealous officials. Habeas Corpus might, and did, protect the subject from unlawful arrest, or at any rate ensure his speedy release from gaol, but a civil action for false imprisonment hit the authorities where it hurt most, in their private pockets, and the unfettered right of juries to assess the damages at whatever figure they thought fit was a formidable deterrent to such as might be tempted to offend public opinion by relying on 'reasons of State.' The lesson bit deep. Even in the dark times to come, when the struggle with Napoleon forced the Government to take all sorts of repressive measures against real or imagined traitors, the powers of the executive to infringe the liberty of the subject were narrowly circumscribed and vigilantly watched by Parliament. Not until the world wars of the twentieth century was the mere word of a Minister of the Crown enough to legalise the imprisonment of an Englishman."

W. S. Churchill, The Age of Revolution, Bantam, N.Y. (1957), 138-140.

invalid Presidential instructions); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L Ed 2d 619 (1971) (implying action for damages by reason of Fourth Amendment violation); *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 686-688, 93 L Ed 1628, 1634-1635 (1949);[2] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 79 L Ed 2d 67, 79, n. 11 (1984);[3] and *Quern v. Jordan*, 440 U.S. 332, 345, 59 L Ed 2d 332, 369-370, n. 17 (1979).[4]

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[2] "The question presented to the courts below was whether such an injunction [against the sale of government-owned property to a competing bidder] was barred by the sovereign's immunity from suit. Before answering that question it is perhaps advisable to state clearly what is and what is not involved. There is not involved any question of the immunization of Government officers against responsibility for their wrongful actions. If those actions are such as to create a personal liability, whether sounding in tort or contraction, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. As was said in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580, 87 L Ed 471, 476 (1943), the principle that an agent is liable for his own torts 'is an ancient one and applies even to certain acts of public officers or public instrumentalities.' But the existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable....[T]he crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect be obtained against the sovereign."

[3] "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'

Impliedly reaffirming the availability of Section 1983 judgments against state officers individually for actions taken officially ("a victory against the individual"), which is what respondents are seeking in the matter at bar, this Court has drawn a bright line between "personal-capacity" suits directed against the personal estate of officials like the petitioner Hafer, and "official-capacity" suits directed against the public treasury and therefore subject to the Eleventh Amendment proscription articulated in *Will v. Michigan Department of State Police*, 491 U.S. , 109 S. Ct. 2304, 105 L Ed 2d 45 (1989) and relied on by the instant petitioner. For the distinction, see *Kentucky v. Graham*, 473 U.S. 159, 165-166, 87 L Ed 2d 114, 121, (1985) (unreasonable search and seizure):

> "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity

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Dugan v. Rank, 372 U.S. 609, 620, 10 L Ed 2d 15 (1963)."

[4] "Mr. Chief Justice Marshall's opinion in *Osborn [v. Bank of the United States*, 9 Wheat 738, 6 L Ed 204 (1824)] makes it clear that in determining whether a court can grant relief the key inquiry is whether the state officer was in fact the real party in interest or whether he was only a nominal party. 9 Wheat, at 858, 6 L ed 204....Mr. Chief Justice Marshall emphasized this precise point just four years later in *Governor of Georgia v. Madrazo*, 1 Pet 110, 7 L Ed 73 (1828). In *Madrazo*, a vessel carrying slaves was seized and the slaves were delivered into the possession of the Governor of Georgia. The slaves were sold and the proceeds were placed in the state treasury. Madrazo filed a libel in the Federal District Court, naming the Governor of Georgia, among others, as a defendant. Restitution was ordered by the lower courts, but this Court reversed because although the demand for relief nominally was against the Governor of the State, it was clear that the action in fact sought relief directly from the state treasury, relief that was forbidden by the Eleventh Amendment."

> receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself."[5]

It is precisely due to the unavailability of sovereign immunity that this Court has found it necessary to develop prudential doctrines of absolute or qualified personal immunity for federal officials sued individually for damages at common law or under *Bivens*, and State officials sued under Section 1983. In doing so, the Court has generally preserved the common-law tradition of individual personal liability for unlawful executive acts done under color of law. For a refusal to accord absolute immunity to most functions of officials sued in their individual capacities and for a catalogue of the various immunities, see *Forrester v. White*, 484 U.S. 219, 223-225, 98 L Ed 2d 555, 563-564 (1988).[6] All the work which this Court has expended in

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[5] This extract from *Graham* is cited with approval in *Will*. 105 L Ed 2d at 58. It appears that the *Will* plaintiff's action for damages was directed exclusively at the State treasury. The Michigan Supreme Court took that position in the judgment which this Court affirmed, and accordingly directed its discussion to the doctrine of *Edelman v. Jordan*, 415 U.S. 651, 39 L Ed 2d 662 (1974). *Will v. Department of Civil Service*, 428 Mich. 540, , 410 N.W. 2d 749 at 767-770 (1987). The Michigan court noted that "We deal then only with the question whether a state official being sued in an official capacity for retroactive relief is a person for purposes of § 1983." 410 N.W. 2d at 768. The determinant, then, was the capacity in which the official was being sued, not that in which he or his official predecessor had acted.

[6] "Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court....Officials who seek exemption from personal liability have the burden of showing that such

reconciling the ideal of the rule of law with the need for fearless public administration, by developing a qualified immunity doctrine,[7] is wasted effort, and *Forrester* and its progenitors are wrongly decided, if petitioner is correct in her contention that an executive officer of a public employer "acting within her official capacity in connection with the discharge of employees [is] entitled

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an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of 'qualified' immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

"This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const, Art I, § 6, cl 1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require. Furthermore, on facts analogous to those in the case before us, the Court indicated that a United States Congressman would not be entitled to absolute immunity, in a sex discrimination suit filed by a personal aide whom he had fired, unless such immunity was afforded by the Speech or Debate Clause.

"Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts. This immunity, however, is based on the President's 'unique position in the constitutional scheme,' and it does not extend indiscriminately to the President's personal aides, or to cabinet level officers. Nor are the highest executive officials in the States protected by absolute immunity under federal law."

(Citations omitted).

[7] In the case of government officials performing discretionary functions, the test for liability is whether their conduct has violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L Ed 2d 396, 410 (1982). Further, in the case of a statute, there has to be a clear violation of the statutory rights that give rise to the cause of action for damages. *Davis v. Scherer*, 468 U.S. 183, 194, 82 L Ed 2d 139, 149, n. 12 (1984). The officer's conduct is appraised in the light of the historical information actually available to her. *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L Ed 2d 523, 532 (1987).

to the absolute immunity of the Eleventh Amendment to the Constitution of the United States". The contrary established doctrine is that such officers are "person[s acting] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory", and so subject to the Fourteenth Amendment and to Section 1983, albeit under the shield of qualified immunity. As this Court said in *United States v. Classic*, 313 U.S. 299, 326, 85 L Ed 1368, 1383 (1941); and in *Monroe v. Pape*, 365 U.S. 167, 184, 5 L Ed 2d 492, 503 (1961): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Nothing turns on the matter, observed by the District Judge, that "[plaintiffs'] grievances are directed against the impact of the Commonwealth's termination of their employment. Hafer's power to cause the terminations derived solely from her authority as a[n] official." The same could be said of personnel actions taken by a Member of Congress, *Davis v. Passman*, 442 U.S. 228, 60 L Ed 2d 846 (1979), and by a state judge, *Forrester v. White*, 484 U.S. 219, 98 L Ed 2d 555 (1988), and by the Secretary of the Air Force at the prompting of a Presidential counsellor, *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L Ed 2d 396 (1982); and of cancellation of a license by the Secretary of Agriculture, *Butz v. Economou*, 438 U.S. 478, 57 L Ed 2d 895 (1978); and of search and seizure by the Attorney General, *Mitchell v. Forsyth*, 472 U.S. 511, 86 L Ed 2d 411 (1985); and forfeiture of good time by a prison disciplinary committee, *Cleavinger v. Saxner*, 474 U.S. 193, 88 L Ed 2d 507 (1985); and deployment of the National Guard by the Governor of Ohio, *Scheuer v. Rhodes*, 416 U.S. 232, 40 L Ed 2d 90 (1974).

Conclusion

Petitioner should be remitted to such qualified immunity as she may find in the measurement of her conduct by the standards of *Elrod v. Burns*, 427 U.S. 347, 49 L Ed 2d 547 (1976); and *Branti v. Finkel*, 445 U.S. 507, 63 L Ed 2d 574 (1980). See also *Rutan v. Republican Party of Illinois*, 497 U.S. , 111 L Ed 2d 52 (1990). The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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